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11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 SAN FRANCISCO DIVISION  
14

15 UNITED STATES OF AMERICA, )

16 Plaintiff, )

17 v. )

18 PAVEL LAZARENKO, )

19 Defendant. )  
20

No. CR 00-0284 MJJ

MOTION IN LIMINE TO ADMIT  
STATEMENTS OF YULIA  
TYMOSHENKO AS CO-CONSPIRATOR  
STATEMENTS

Date: February 6, 2004  
Time: 9:30 am  
Courtroom: Hon. Martin J. Jenkins

21 The United States hereby moves in limine to admit statements made by Yulia  
22 Tymoshenko, an un-indicted co-conspirator, during the course of and in the furtherance of the  
23 conspiracy and the scheme to defraud.

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**FILED**

JAN 30 2004

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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ARGUMENT

I. THE STATEMENTS OF YULIA TYMOSHENKO, A NON-TESTIFYING CO-CONSPIRATOR, ARE ADMISSIBLE IN EVIDENCE UNDER FED. R. EVID. 801(d)(2)

A. Legal Authority

Under Fed. R. Evid. 801(d)(2)(E), "a statement by a coconspirator of a party during the course of and in furtherance of the conspiracy" is not hearsay. United States v. Crespo de Llano, 838 F. 2d 1006, 1017 (9<sup>th</sup> Cir. 1987). To admit statements of a coconspirator against a defendant, there the government need only establish by a preponderance of the evidence that (1) the declarant and the defendant were members of a conspiracy; and (2) the statements were made during and in furtherance of the conspiracy. Bourjaily v. United States, 483 U.S. 171, 175 (1987). Once a conspiracy is shown, the prosecution need only present slight evidence connecting the defendant to the conspiracy. United States v. Mason, 658 F. 2d 1263, 1269 (9<sup>th</sup> Cir. 1981). Under Bourjaily, the requirements of Rule 801(d)(2)(E) and the confrontation clause of the Sixth Amendment are identical. 483 U.S. at 182-84.

A conspiracy need not be charged in order to allow the introduction of a co-conspirator's statement under the rule. United States v. Portac, Inc., 869 F. 2d 1288, 1294 (9<sup>th</sup> Cir. 1989). Participation as an aider and abettor is sufficient, as a concert of action creates a conspiracy for purposes of the evidentiary rule. Id. See also, United States v. LeFever, 798 F. 2d 977, 983 (7<sup>th</sup> Cir. 1986); United States v. Reynolds, 919 F. 2d 435, 439 (7<sup>th</sup> Cir. 1990); and United States v. Blankenship, 954 F. 2d 1224, 1231 (6<sup>th</sup> Cir. 1992). Moreover, evidence against one defendant in a conspiracy can properly be considered against another defendant given evidence linking each to the conspiracy. United States v. Nixon, 918 F. 2d 895, 906 (11<sup>th</sup> Cir. 1990).

In determining whether a statement was made "in furtherance of" a conspiracy, the focus is not on its actual effect in advancing the goals of the conspiracy, but on the declarant's intent in making the statement. United States v. Zavala-Sierra, 853 F.2d 1512, 1516 (9<sup>th</sup> Cir. 1988).

Thus,

When a declarant seek[s] to induce [the listener] to deal with the conspirators or in any other way to cooperate or assist in achieving the conspirator's common objective, the declaration may be admissible [as a co-conspirator statement].

Statements concerning activities of the conspiracy, including future plans, also may become admissible when made with such intent.

United States v. Foster, 711 F. 2d 871, 880 (9<sup>th</sup> Cir. 1983). A statement is "in furtherance" of a conspiracy if it furthers the common objectives of the conspiracy or sets in motion transactions that are an integral part of the conspiracy. United States v. Layton, 720 F. 2d 548, 556-57 (9<sup>th</sup> Cir. 1983), cert. denied, 465 U.S. 1069; 104 S. Ct. 1423; 79 L.Ed. 2d 748 (1984). Statements made to induce enlistment or further participation in the group's activities are considered to be "in furtherance" of the conspiracy. United States v. Dorn, 561 F. 2d 1252, 1256-57 (7<sup>th</sup> Cir. 1977) (per curiam), overruled on other grounds, United States v. Read, 658 F.2d 1225, 1236, n. 6 (7<sup>th</sup> Cir. 1981). Likewise, statements made to prompt further action on the part of conspirators are admissible under 801(d)(2)(E), United States v. Dendall, 665 F.2d 126, 133 (7<sup>th</sup> Cir. 1981), cert. denied, 455 U.S. 1021, 102 S.Ct. 1719, 72 L.Ed. 2d 140 (1982), as are those made to "reassure" members of a conspiracy's continued existence. United States v. Mason, 658 F.2d 1263, 1270 (9<sup>th</sup> Cir. 1981). Statements made to allay a co-conspirator's fears are admissible. Eubanks, 591 F.2d at 521, n. 7. Most importantly, statements made to keep co-conspirators abreast of an ongoing conspiracy's activities satisfy the "in furtherance of" requirement. United States v. Eaglin, 571 F. 2d 1069, 1083 (9<sup>th</sup> Cir. 1977), cert. denied, 435 U.S. 906, 98 S.Ct. 1453, 55 L.Ed.2d 497 (1978); United States v. Moody, 778 F.2d at 1382 (statements made to "higher ups" of the group are "in furtherance"); see also, Crespo de Llano, 830 F.2d at 1543: (Statements are in furtherance of the conspiracy if they are made to keep a person abreast of the conspirator's activities, to induce continued participation in the conspiracy, or to allay fears.)

A trial court has discretion to vary the order of proof in admitting a co-conspirator's statement; the statement may be admitted prior to the presentation of independent evidence of the conspiracy. United States v. Loya, 807 F. 2d 1483, 1490 (9<sup>th</sup> Cir. 1987) and United States v. Arbelaez, 719 F. 2d, 1453, 1460 (9<sup>th</sup> Cir. 1983).

#### B. The Charged Conspiracy and the Scheme to Defraud

Count One of the Second Superseding Indictment alleges a conspiracy to launder money



1 among the defendant, Peter Kiritchenko, and others between January 1992 and June 1999. The  
2 indictment generally alleges that the defendant and others conspired to launder the proceeds of  
3 extortion and fraud through various bank accounts, including accounts in the United States. The  
4 indictment alleges conspiracy that as part of the conspiracy Lazarenko, as a government official  
5 in Ukraine, would engage in various acts of extortion and fraud, and would receive funds that  
6 had been stolen, converted and taken by fraud, and would transfer the proceeds of this activity  
7 into bank accounts in Switzerland, Antigua, Poland, the United States, and elsewhere, and that he  
8 induced Kiritchenko to assist Lazarenko to open bank accounts in Switzerland, Antigua, Poland,  
9 and the United States, and to transfer the proceeds of fraud and extortion into and out of these  
10 bank accounts in an effort to conceal and disguise the nature, location, source, ownership, and  
11 control of the proceeds of the specified unlawful activity. The conspiracy count incorporates the  
12 wire fraud scheme to defraud, which more specifically alleges that the defendant received money  
13 and property from individuals and businesses on behalf of whom he was exercising his official  
14 authority.

15 In particular, with respect to Ms. Tymoshenko, the indictment alleges that in  
16 approximately September 1995, Lazarenko, as First Vice Prime Minister of Ukraine, became  
17 responsible for the energy section in the Ukrainian government, and that in approximately  
18 December 1995, a Ukrainian company called United Energy Systems of Ukraine ("UESU"),  
19 which was created on November 20, 1995 by Yulia Tymoshenko, an associate of Lazarenko's,  
20 was designated by the Ukrainian government as one of several companies to supply natural gas to  
21 Ukraine. UESU was given the authority to distribute natural gas to the Dnepropetrovsk region of  
22 Ukraine. From approximately December 1995 until sometime in 1997, UESU received  
23 deliveries of natural gas from RAO Gazprom pursuant to contracts entered on December 29,  
24 1995 and December 31, 1996 between RAO Gazprom, UESU, and others. Beginning in  
25 approximately January 1996, UESU fraudulently conveyed title to the imported natural gas to  
26 United Energy International, Ltd. ("UEIL"), an 85% shareholder of UESU that was created on  
27 October 17, 1995, in London, England by a Turkish national named Ercument Aksoy, at the  
28 direction of Yulia Tymoshenko, and fraudulently diverted to foreign bank accounts belonging to  
UEIL the payments from Ukrainian customers for the natural gas delivered by UESU.

1 The indictment further alleges that between April 8, 1996 and December 31, 1996, rather  
 2 than pay RAO Gazprom for the delivered gas with the money that had been transferred to UEIL,  
 3 UEIL transferred approximately \$140,000,000 to Somolli Enterprises, a Cypriot company that  
 4 was registered in Cyprus on October 8, 1992, and was controlled by Yulia Tymoshenko and  
 5 others. Between April 1996 and June 1997, Somolli Enterprises and UESU transferred a total of  
 6 approximately \$97,000,000 into accounts that were controlled by Kiritchenko in Switzerland,  
 7 Poland, and the United States, including transfers totaling approximately \$13,000,000 to bank  
 8 accounts in the Northern District of California. Between February of 1996 and September of  
 9 1997, the money from Somolli, along with other funds, totaling more than \$120,000,000 was  
 10 transferred from Kiritchenko's accounts into accounts controlled by Lazarenko in Switzerland  
 11 and Antigua. Thereafter, the indictment alleges, Lazarenko transferred portions of these funds  
 12 from Switzerland into bank accounts in the Northern District of California, including two  
 13 transfers of \$14,000,000 each on August 1, 1997.

14 Finally, part of the conspiracy includes the scheme to defraud alleged in Paragraphs 32 to  
 15 38 of the indictment, which allege that the defendant, while a government official in Ukraine,  
 16 exercised his official authority and influence in favor of, and to induce the grant of certain  
 17 government benefits and privileges to Yulia Tymoshenko's businesses, among others, by taking  
 18 certain official action, that between 1993 and 1997 he received over \$200,000,000 from various  
 19 companies, including Yulia Tymoshenko's businesses Somolli Enterprises (\$84,000,000), UEIL  
 20 (\$65,000,000), and UESU (\$13,000,000). The indictment alleges that as a result of these actions,  
 21 the people and government of Ukraine were deprived of money and of the defendant's right to  
 22 honest services.

### 23 C. Tymoshenko's Statements and Background

24 The United States will seek to admit as coconspirator statements under Fed. R. 801(d)(2)  
 25 the following statements of Yulia Tymoshenko, and reserves the right to offer additional  
 26 statements if the evidence warrants:

#### 27 1. Tymoshenko statements to Neil Flieger, Eric Hoffman, Marika Jurach, and 28 Vitaly Garber

Vitaly Garber and Marika Jurach work for a company called Garber International

1 Associates. In late 1996 their company was retained by UESU to “assist UESU in combatting  
 2 allegations in the Western press that it was tied through corruption with politicians in Ukraine,  
 3 principally to Pavel Ivanovich Lazarenko, the then-Prime Minister of Ukraine.” See Garber 302,  
 4 X000088. Yulia Tymoshenko was his principal contact at UESU, and she explained to Garber  
 5 that UESU was participating in a new gas distribution system set up by Lazarenko and. Id. She  
 6 told Garber she wanted to assist Lazarenko’s political career and that part of what UESU was  
 7 hiring Garber to do was to get favorable publicity for Lazarenko.

8 Garber then hired Edelman Public relations in Washington, D.C. to represent UESU.  
 9 Neil Flieger and Eric Hoffman worked for Edelman and had numerous meetings with Yulia  
 10 Tymoshenko. Flieger and Hoffman will testify about statements she made to them about the  
 11 work they were doing for Lazarenko, which UESU was paying for.

12 These statements are in furtherance of the conspiracy because they were made “to induce  
 13 [the listener] to deal with the conspirators or in any other way to cooperate or assist in achieving  
 14 the conspirator’s common objective,” Foster, 711 F. 2d at 880, which in this case was to ensure  
 15 that the defendant could maintain his political position so that he could continue to render official  
 16 assistance to UESU in exchange for the money and financial assistance he was getting from  
 17 UESU.

## 18 2. Tymoshenko Statements to Serif Ercument Aksoy, Gravets

19 Tymoshenko also made a number of statements to Serif Ercument Aksoy and Oleksander  
 20 Gravets that the United States will seek to introduce as co-conspirator statements. Serif  
 21 Ercument Aksoy was the nominal head of United Energy International (“UEIL”) and worked  
 22 with Tymoshenko in that business. Oleksandr Gravets was one of the founding members of  
 23 UESU and worked with Tymoshenko in that business. These statements primarily concern the  
 24 business operations of and relations between UEIL, UESU, and Somolli Enterprises during the  
 25 course of the conspiracy. Some of the statements concern the defendant’s relationship to UESU  
 26 and his role in the Ukrainian gas market. These statements are in furtherance of the conspiracy  
 27 and the scheme to defraud because they further the common objectives of the conspiracy and  
 28



1 scheme and sets in motion transactions that were an integral part of the conspiracy, that is, they  
 2 were made to further the goal of concealing and disguising the source, location, ownership and  
 3 control of the funds that were paid to the defendant, and they were made to further the scheme to  
 4 defraud by enlisting Aksoy and Gravets in that scheme and prompting further action on their part.  
 5 Layton, 720 F. 2d at 556-57; Dendall, 665 F.2d at 133.

6 The United States also seeks to introduce Tymoshenko's explanation to Gravets in Israel  
 7 about the payments made to the defendant. These statements were in furtherance of the  
 8 conspiracy because they were made to reassure Gravets, Mason, 658 F.2d at 170, and to allay his  
 9 fears. Eubanks, 591 F.2d at 521, n. 7. Furthermore, the statements wer made to induce Aksoy  
 10 and Gravets to deal with Tymoshenko and to cooperate or assist in achieving the conspiracy's  
 11 common objective, Foster, 711 F. 2d at 880,

### 12 3. Tymoshenko Statements to Andreas Petrou

13 Andreas Petrou was a nominal director of Somolli Enterprises, and it was through Petrou  
 14 that Tymoshenko, Gravets, and Oleksandr Tymoshenko set up Somolli Enterprises in Cyprus.  
 15 The United States seeks to introduce Tymoshenko's statements to Petrou as co-conspirator  
 16 statements made to further the common goals of the conspiracy, that is to set up a corporate  
 17 structure designed to conceal and disguise the location, source, and ownership of funds paid to  
 18 the defendant. See Layton, 720 F. 2d at 556-57. Furthermore, the statements were made to  
 19 induce Petrou to deal with Tymoshenko and to cooperate or assist in achieving the conspiracy's  
 20 common objective. Foster, 711 F. 2d at 880.

### 21 4. Tymoshenko Statements to Andrei Vavilov and other Russian Witnesses

22 Andrei Vavilov was the Russian Deputy Minister of Finance in 1996 and he was a  
 23 signatory on a contract between the Russian Ministry of Finance, the Russian Ministry of  
 24 Defense, RAO Gazprom, UESU, and UEIL, pursuant to which UESU agreed to deliver goods to  
 25 the Russian Ministry of Defense to extinguish its debt to RAO Gazprom for prior deliveries of  
 26 gas to Ukraine. Vavilov met with Tymoshenko in Moscow, and during that meeting she  
 27 explained the debt to Vavilov and the reasons why they wanted to execute the agreement.  
 28

1 Tymoshenko's statements to Vavilov are in furtherance of the conspiracy because the statements  
2 were made to induce Vavilov into action that would further the common objectives of the  
3 conspiracy, that is, to conceal and disguise the source of the funds that had been paid to the  
4 defendant and to advance the common goal of the conspiracy, which was to ensure that in  
5 exchange for his official actions, the defendant would receive funds from Tymoshenko and her  
6 companies and that his receipt of funds would not be discovered.

7 5. Tymoshenko Statements to Kleshnya and Shostak

8 Anatoliy Kleshnya and Anatoly Shostak worked at the State Committee for Material  
9 Resources of Ukraine. Each testified that the defendant instructed them to enter a contract with  
10 UESU for UESU to sell material goods to the government of Ukraine for its reserves. Each will  
11 testify about conversations they had with Yulia Tymoshenko regarding the pricing of the goods  
12 and the attempts to negotiate a contract. Ultimately no contract was entered because they  
13 believed that UESU was overcharging the government for the goods.

14 The government will introduce these statements either as co-conspirator statements or as  
15 non-hearsay because they are not admitted for the truth of the matter. These statements were in  
16 furtherance of the conspiracy because they advanced a common goal of the conspiracy – to use  
17 the defendant's official position to garner benefits for UESU, in exchange for which the  
18 defendant received a portion of UESU's profits. Furthermore, the statements are not hearsay,  
19 because they are not admitted for the truth of the matter asserted.

20 6. Other Tymoshenko Statements

21 There may be other statements of Tymoshenko that the United States will seek to admit if  
22 they are in furtherance of the conspiracy.

23 D. The Evidence of a Conspiracy

24 Besides the statements themselves, which, of course, the Court can consider as evidence  
25 of the conspiracy, the United States will also introduce a variety of documents and other witness  
26 testimony that will demonstrate the existence of a conspiracy and Yulia Tymoshenko's  
27 participation in that conspiracy. These records will include bank records from Switzerland, the  
28



1 United States, England, Cyprus and other locations that demonstrate the payment of hundreds of  
 2 millions of dollars to the defendant by companies controlled by Tymoshenko. It will also include  
 3 documents from Cyprus, England and Ukraine demonstrating the formation and establishment of  
 4 bank accounts for of Somolli Enterprises, UESU, and UEIL. The evidence will also include  
 5 statements of other witnesses describing the relationship between the defendant and UESU and  
 6 UEIL, testimony of the Swiss bankers about what the defendant told them about money he was  
 7 receiving from UESU (that it was "commissions"), and Peter Kiritchenko's statements about the  
 8 defendant's relationship to Tymoshenko and payments that were made by Tymoshenko to the  
 9 defendant. The evidence will also include official records from Ukraine showing the official  
 10 action the defendant took for the benefit of UESU or companies controlled by Tymoshenko, such  
 11 as Directive 100 and the \$200,000,000 guarantee. Finally, it will also include evidence of  
 12 correspondence between RAO Gazprom and the defendant, and Tymoshenko and RAO  
 13 Gazprom, regarding UESU's debts for the gas delivered in 1996.

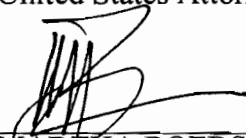
#### 14 CONCLUSION

15 For the foregoing reasons and based on the record herein, the United States respectfully  
 16 moves to admit statements of Yulia Tymoshenko made in furtherance of the conspiracy and  
 17 scheme to defraud.

18 DATED: January 30, 2004

Respectfully submitted,

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 28

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the Office of the United States Attorney for the Northern District of California and is a person of such age and discretion to be competent to serve papers. The undersigned further certifies that she caused a copy of:

**MOTION IN LIMINE TO ADMIT STATEMENTS OF YULIA TYMOSHENKO  
AS CO-CONSPIRATOR STATEMENTS**

in the case United States v. Pavel Lazarenko, No. CR 00-0284 MJJ to be served on the party(ies) in this action, address as follow which is the last known address:

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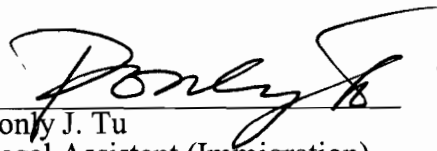
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X (By Facsimile), I caused each such document to be sent by Facsimile to the person or office of each addressee(s) above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: January 30, 2004

  
Ponly J. Tu  
Legal Assistant (Immigration)  
U.S. Attorney's Office